IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs March 28, 2007

STATE OF TENNESSEE v. MISTY BRUNELLE

Direct Appeal from the Criminal Court for Greene County
No. 05-CR-110 James Edward Beckner, Judge

No. E2006-00467-CCA-R3-CD - Filed July 13, 2007

A Greene County Jury convicted the Defendant, Misty Brunelle, of three counts of aggravated child abuse, and the trial court sentenced her to an effective sentence of twenty-five years in the Department of Correction. On appeal, she alleges: (1) there is insufficient evidence to support any conviction for aggravated child abuse; (2) there is insufficient evidence to support her three distinct aggravated child abuse convictions; (3) the trial court erred in not dismissing the indictments; (4) the trial court erred in allowing all the aggravated child abuse charges to be tried together; (5) the trial court erred in allowing the State to use the Defendant's statements in its case-in-chief; (6) the trial court erred in refusing to instruct the jury on the charge of aggravated assault by failure to protect; (7) the trial court erred in not granting a mistrial after the jury improperly focused on extraneous issues; and (8) the trial court erred in sentencing the Defendant. After a through review of the record and applicable law, we affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Affirmed

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and J.C. MCLIN, JJ., joined.

Greg W. Eichelman, Morristown, Tennessee, for the Appellant, Misty Brunelle.

Robert E. Cooper, Jr., Attorney General and Reporter; Brent C. Cherry, Assistant Attorney General; C. Berkley Bell, District Attorney General; Cecil Mills and Amber Depriest, Assistant District Attorneys General, for the Appellee, State of Tennessee.

OPINION

I. Facts

The facts making up the basis for the Defendant's convictions as presented at trial are as

follows: Judy Shuler, a registered nurse at the Takoma Adventist Hospital, testified that the victim was presented to her at the hospital by the Defendant and the victim's father, and she performed the initial assessment. The Defendant told Shuler that the victim had been crying all day and that the victim's leg was swollen, and she did not know why. Shuler asked if the victim had fallen off the couch or her seat, and the Defendant replied, "no." When Shuler removed the blanket that the victim had been wrapped in, she noticed the baby's arm was limp, and the baby cried when her arm was touched. Additionally, Shuler noticed that the child's leg was swollen to two to three times its normal size. She did not leave the baby alone with the Defendant, and proceeded to aid the child in this "orthopedic emergency."

Dr. Susan O'Brien testified that she was the emergency room staff physician at Takoma Adventist Hospital, and she examined the victim in the emergency room. During her examination, she noticed the victim's right arm moved appropriately, but she guarded her left side. Both her left arm and left leg were not moving appropriately; they were essentially stiff. At that age, a crying child would normally move both arms and both legs. The victim appeared to be in pain any time her left arm or left leg were examined.

Dr. O'Brien testified that the victim was then x-rayed, which uncovered a fracture of the left humerus — the long bone in the arm, a fracture of the left radius — the bone under the thumb, and a fracture of the left femur — the thigh bone. She explained the fractures to the Defendant, who asked how those injuries could have occurred. Dr. O'Brien responded that she believed it would take a "lot of force for those to occur." The Defendant began to cry and walked back to the room where the victim was located. Dr. O'Brien notified the police, the Children and Family Services, and the pediatrician on call.

On cross-examination, Dr. O'Brien testified that the victim cried during the entire examination. The Defendant told Dr. O'Brien that the victim had diabetes, but Dr. O'Brien explained to the Defendant that diabetes would have nothing to do with trauma. The Defendant and the victim's father were questioned about the child's medical history. Although the victim's father, Jason Brunelle, was present during the hospital visit, the Defendant primarily answered the doctor's questions and examined the x-rays.

On re-direct examination, Dr. O'Brien testified that she was concerned about the Defendant's behavior that night, mainly because the Defendant could not give answers to the doctor's questions. Additionally, the Defendant could not explain how the child sustained these injuries. On re-cross examination, Dr. O'Brien stated that Jason Brunelle provided no information whatsoever.

Glenn Miller, the owner of a Greeneville, Tennessee, Budget truck rental franchise, testified that he received a truck on January 13, 2003, that had been rented on January 10, 2003.

Jason Brunelle testified that the Defendant was his ex-wife. Their child, the victim, was born on October 22, 2002, a healthy baby with no medical problems. The three moved to Vermont around Thanksgiving 2002 to live with his mother. Approximately a week after they moved to Vermont,

the victim was taken for a check-up, which revealed no problems. Around that same time, there was a dispute between the couple and Jason Brunelle's mother, which forced the three to move out. They lived with another friend of Jason Brunelle's, Diana Hayes, in Vermont for between a week and two weeks. Then, on January 13, 2003, the three moved back to Tennessee, and into a house where Tammy Pitt, Randy Pitt, and Tommy Arwood lived together. Tammy Pitt is the Defendant's mother. Tommy Arwood is Tammy Pitt's boyfriend. Randy Pitt is the Defendant's brother.

Jason Brunelle examined a previously entered Budget truck rental receipt, and he stated that it was accurate, and it showed they left Vermont on January 10, 2003, and arrived in Tennessee on January 13, 2003. Jason Brunelle stated that the victim did not show any signs of injury prior to January 13, 2003. The house had three bedrooms and approximately seven to eight total rooms, and the victim would primarily spend her time in Jason Brunelle and the Defendant's bedroom. Jason Brunelle stated that he had never had a broken bone.

Jason Brunelle further testified that the victim's crying prompted him and the Defendant to take her to the hospital. She had been crying this way for about a week, and this crying was different from normal crying. Additionally, the victim was not as active as she had previously been. Jason Brunelle stated that he had never seen anyone injure the victim, he never hurt the victim, and he never rolled over onto the victim. The Defendant never told him what happened to the victim.

On cross-examination, Jason Brunelle testified that the house in Tennessee was a wooden house, which no one, save the Defendant's grandmother, would visit. As one enters the back door of the house, there is a storage room to one side, then a large living area, a bathroom at the end of a hall, and there are three bedrooms in a row. He further stated that the trip from Vermont took about seventeen hours, and the victim sat in a child seat. The victim had been to the doctor in Vermont due to diarrhea, and the Defendant got the medicine for her. Jason Brunelle then admitted that he and the Defendant had an emotional marriage, but he denied ever hitting, threatening, or scaring her. He admitted that he had a temper, but he denied that he had ever held a knife to the Defendant's throat. Although Jason Brunelle wanted a son, he was also happy to find out he and the Defendant were having a girl. At one point, he told the people at the hospital that he had brittle bone disease in his family, but he then found out that was not true. He also told the doctor that there was a history of multiple sclerosis in his family. Jason Brunelle further testified that he was not alone with the victim while in Tennessee.

Donna Myers, formerly with the Department of Children's Services, testified that she spoke with the Defendant on January 28, 2003, at the Takoma Adventist Hospital. The Defendant stated she did not know how the victim had sustained the broken bones. The Defendant stated that the baby was never left alone with anyone other than herself or the father. Additionally, the Defendant did not recall if the victim had rolled off something. The Defendant stated that the victim began crying the day before she was brought to the hospital. When Myers stated that she would have to take the baby until it could be determined what happened, the Defendant "cussed [her] and walked out of the room." The Defendant called Myers the next day, and she stated that when she arrived home the previous night, she told those at the house what had happened. She stated that Tommy Arwood "got

up, said he would never hurt the baby, and left in his night clothes, and they hadn't seen him since." Then, on January 31, 2003, the Defendant again called Myers, and she stated she knew for a fact how the victim's bones were broken. She stated that Jason Brunelle had fallen asleep and rolled over on the baby. This was the first time Myers had heard that explanation.

On cross-examination, Myers testified that Jason Brunelle never called to offer an explanation. Both the Defendant and Jason Brunelle stated they brought the victim in because she had been crying for a day. When Myers stated that she would have to keep the victim, the Defendant stormed out of the room while Jason Brunelle sat crying in the corner.

Investigator Teddy Collingsworth testified that he was contacted by Donna Myers on January 29, 2003, the day after the victim was presented to the Takoma Adventist Hospital. He set up a meeting with the Defendant, Jason Brunelle, and Tammy Pitt, the Defendant's mother. Investigator Collingsworth sat down with each person individually and discussed the situation with them. The Defendant gave a statement, which was reduced to writing, and it read as follows:

> Jason Brunelle and I went to Vermont November the 16th of 2002 and stayed with Jason's mother, Mary Brunelle, and her boyfriend, George . . . .
>
> [The victim] was with us also. [The victim] was doing fine. We took her to the clinic to get her shots. But just before Christmas, there was a big fight at the house with Mary, myself, and Jason; and Mary pushed a TV over and it liked to have hit [the victim]. We called the law and there was a case pending against Mary.
>
> Jason, [the victim,] and I moved in with Diana Hayes . . . just before Christmas, and we stayed there until January 17th, 2003; that's when we moved back to Greeneville, Tennessee.
>
> Jason worked while we lived with Diana at the Halls Market and Deli. [The victim] was thriving and fine, and when she would cry, Jason would be the one that would get her to hush. It's always been that if one of us get upset, that the other would take care of [the victim].
>
> When we got back to Tennessee at my mother's house on 1-18-03, that being Tammy Pitt, my brother, Randy Pitt, 15 years of age was living there, mom's boyfriend, Tommy Arwood, also.
>
> Randy is bipolar. Randy only plays with [the victim] when Jason and I are around. Mom baby-sits when I go to the store or when we go to the E.R. Jason also took care of [the victim]. My cousin, Billy Dale Childers, and girlfriend, Kay, was at the house when we got home from Vermont.
>
> There was nothing that was wrong with [the victim] that I could tell. I thought that maybe the seatbelt across the baby seat could be too tight. I've never done anything that would hurt my child or have my – or have seen anyone else to do anything to [the victim].
>
> But most of the time, when I get impatient with [the victim] crying, I will holler at Jason. When Jason's not at home, I just handle it.

The Defendant left the interview, and she called Donna Myers the next day, January 31, 2003, to tell her that Jason Brunelle rolled over onto the child, and that was the cause of her injuries. Investigator Collingsworth again met with the Defendant and Jason Brunelle to discuss the situation. The Defendant made another statement, which was reduced to writing, as follows:

> Jason, [the victim], and I have been in Tennessee since the middle of January 2003. While staying at my mom, Tammy Pitt's home, I sometimes while playing with [the victim] I will get both her legs and push them back and forth like she was riding a bicycle. I do it hard. [The victim] would smile. Also, since being back in Tennessee, I was home alone with [the victim] and I dropped [her] and caught her by her left arm. I sometimes will get around her chest with my hands and put her over my head, and I will stick my tongue out at her. When [the victim] is crying, I get upset because she won't stop. I will not pick her up but sometimes when nobody is there, I will take care of her.
>
> I sometimes give [the victim] to Jason or someone else she [sic] I get upset. The night I hit the dresser with my hand was the night [the victim] was taken. Sometimes I black – block things out of my head when I've done things or if I'm upset. If [the victim] was here right now, I would tell her that I'm sorry for the pain that I've caused her, that I would take care – take the pain for her. I love her very much. When doing her – [the victim]'s legs, it's not really hard, it's not like gentle as glass. One time Jason threw [the victim] up in the air, and I told him not to do it anymore.
>
> I was told that I wasn't under arrest and that I could get up and leave at any time. I was told that I didn't have to give this statement but I give it freely and voluntarily. I give this to the D.A's office – I came to the D.A.'s office on my own free will.

Although the Defendant had apparently told Donna Myers about Jason Brunelle rolling over on the victim, the Defendant never made statements to that effect to Investigator Collingsworth.

On cross-examination, Investigator Collingsworth testified that he never told the Defendant that she was under arrest or that she could have a lawyer if she wanted one. The statement that had been read into evidence was the result of a discussion Investigator Collingsworth had with the Defendant. After their discussion, the substance of the discussion was reduced to writing, which the Defendant examined line by line. Changes were made to reflect what the Defendant wanted the statement to say, and she signed the statement.

Dr. Robert Thomas testified that he was a radiologist who analyzes x-rays, C.T. scans, M.R.I.s, and ultrasounds, and he specializes in children. He analyzed x-rays of the victim, and he found "a number of fractures or breaks in a variety of bones in both the arms and legs." He found "two breaks in the arm, one in the upper arm bone and one in one of the two bones in the forearm. There were breaks in the bones around both knee joints, and a break in the bone near the left ankle as well." Dr. Thomas went on in depth, with the aid of a projector, describing the fractures to the

victim's bones. As to the left femur, count one in the indictment, Dr. Thomas stated that the fracture occurred approximately two to three weeks prior to January 28, 2003. Dr. Thomas pinpointed the break of the victim's right femur, count two, to be one to two weeks prior to January 28, 2003. As to the fracture of the victim's left tibia, count three in the indictment, Dr. Thomas stated that this fracture also occurred approximately one to two weeks prior to January 28, 2003, but it occurred at a different time than the fracture to the right femur. Finally, the upper arm fracture and the forearm fracture, count four, occurred seven to ten days prior to January 28, 2003. Dr. Thomas also specifically stated that the breaks to the victim's arm were the most recent of all the breaks.

Dr. Thomas testified that the fractures to the left femur and right femur, counts one and two, would have required "a force significantly greater than would be in daily care or in play." Additionally, the injury to the left femur occurred by "wrenching," "a powerful twisting or pulling motion." The fractures to the left tibia and fibula, count three, would have required force "well over and above that in daily care or play." These fractures also showed signs of "wrenching." As to the fractures to the left humerus and forearm, count four, the break to the left humerus was caused by "wrenching," while the forearm fracture was caused by a direct blow. Dr. Thomas also testified that the victim showed no signs of osteogenesis imperfecta, brittle bone disease, a condition that would cause bones to be weak and increase the risk for fracture. Additionally, because the victim did not have the bone disease, normal play would not cause these types of fractures. It might be possible that a dropped baby, caught by the arm, may result in one fracture, but not two fractures.

On cross-examination, Dr. Thomas admitted that there were tests for brittle bone disease, but he did not practice in that area. These tests are available because it is not possible to be absolutely certain, based on x-rays, that one does not have brittle bone disease. Dr. Thomas does not regularly interview the patients, he solely relies on what the x-rays show to make a diagnosis. Additionally, the ranges given on the fractures are just ranges, as no one can say precisely when a break occurred. Although the right femur break and the left tibia break both occurred between one and two weeks prior to the x-ray, the right femur break was older by at least a few days. The oldest break, the left femur, was at a minimum fourteen days old. Therefore, the injury to the left femur could not have occurred after January 14, 2003. Dr. Thomas was given no family history about brittle bone disease when he made his assessment.

The Defendant called Tammy Pitt, who testified that the Defendant, Jason Brunelle, Randy Pitt, and Tommy Arwood lived at her house in Greeneville. Between the time that the Defendant and Jason Brunelle moved to Tennessee from Vermont, and the time the victim was taken to the hospital, Pitt did not notice anyone harm the victim. Pitt stated that Jason Brunelle kept the baby "quite a few times" without the Defendant being present. Specifically, on January 14, 2003, Jason Brunelle was at home with the victim, alone.

Jane Grooms, Tammy Pitt's mother and the Defendant's grandmother, testified that she visited the Pitt home everyday the Defendant and victim were there during January 2003. She never saw anyone hurt the victim.

The Defendant testified that, around Christmas, 2002, she, Jason Brunelle, and the victim were all in Vermont. They originally stayed with Jason Brunelle's mother, but, one night, his mother became drunk and threatened the victim. She threw a television at the Defendant and the victim, almost hitting the victim. The Defendant called the police that night, and they subsequently changed residences. During the time in Vermont, the victim was taken to the doctor, where she was diagnosed with colic and given medicine. The Defendant would give the medicine to the victim every four to six hours, especially at nighttime when the victim's crying would be more persistent. The three left Vermont on January 13, 2003, and arrived in Tennessee on January 14, 2003.

The Defendant testified that she determined the victim should be taken to the hospital instead of a previously made doctor's appointment because her crying was different than it had been before. After triage, the three were taken into an E.R. patient room. They waited there until Dr. O'Brien arrived with someone from the Department of Children's Services. They told the Defendant that the victim had broken bones. The Defendant suspected her husband, Jason Brunelle, had caused the injuries to the victim because she has previously seen him throw the victim over his head, and he beat the Defendant when she was pregnant. The Defendant stated this beating occurred because Jason Brunelle wanted a boy, not a girl. Jason Brunelle previously held a knife to the Defendant's throat, threw her down the stairs, "busted" her nose, and raped her.

In addressing the statements given to Investigator Collingsworth, the Defendant testified that parts of her statements were lies. Jason Brunelle could not keep his job and worked off and on. Additionally, Jason Brunelle told the Defendant not to say anything, or she would regret it. The Defendant stated that whenever she did the "bicycle" with the victim, nothing but smiles and giggles were elicited. She did admit dropping the victim and catching her by the arm, but there were no tears like when the victim was taken to the hospital. The Defendant was then read the portion of her statement that discusses blocking things out of her head, and the pain she caused. She stated she meant "that if I could do it all over again, she wouldn't have had the sorry excuse of a father she had. She would have had a better life and she wouldn't have had to go through all she's gone through." The Defendant then went on to state that she was sure that Jason Brunelle hurt the victim.

On cross-examination, the Defendant admitted that the Budget truck rental receipt indicated the three came back to Tennessee on January 13, 2003. The Defendant stated the only time she was alone with the victim was when she dropped her, catching her by the arm. The Defendant stated that when, in her statement, she said, "Well, sometimes when no one is there, I will take care of her," she meant when everyone else was asleep. She agreed that, at times, when the victim would cry, it would upset her. The Defendant admitted that she previously had a problem with her temper, but the Defendant attributed it to the State trying to take away her baby.

The Defendant further testified that she did not offer any explanation as to the victim's injuries on the date she was taken to the hospital. The Defendant called Donna Myers the day after the victim was taken to the hospital and again on January 31, 2003. The Defendant stated she attempted to offer possible explanations as to what happened. The Defendant failed to inform law enforcement about her belief that Jason was the one abusing the victim because he beat her. She did

not tell the police about Jason Brunelle until he was "out of the picture." The Defendant admitted, however, that she did have an opportunity to explain this to law enforcement prior to trial, but when Investigator Collingsworth came to talk to her about it, the Defendant directed him to her attorney.

Prior to instructing the jury, the trial court determined that the jury should not be given any instructions on the lesser charge of aggravated assault by failure to protect. The trial court found the issue was not fairly raised because the offense requires an intentional or knowing failure to protect the child from an act of abuse. The trial court noted that the only evidence on this issue came from the Defendant, and she stated she attempted to protect the child.

The jury returned a verdict of not guilty as to count one of the indictment, and guilty verdicts as to counts two, three, and four. At the sentencing hearing, Jonathan Travis Honeycutt, the Defendant's husband, testified. Honeycutt stated that he married the Defendant in May of 2005, after the Defendant and Jason Brunelle were divorced. Honeycutt did not know the Defendant in January 2003, and his only knowledge of the events came from observing the trial. Honeycutt was surprised at the Defendant's temper when she was on the stand, but he stated he had never seen her be physically abusive to anyone. Honeycutt also stated that he aided her in obtaining any psychological help she required.

In sentencing the Defendant, the trial court determined the Defendant's sentence should be enhanced based on the fact that the victim was treated with exceptional cruelty when she was not taken to a hospital for at least three weeks while having broken bones. Additionally, the court determined the sentence should be enhanced based on the fact that the Defendant was in a position of private trust. The court stated, "[Y]ou would have to say that in this case this offense could not have happened to this baby by a stranger. That only the mother or the father from the evidence in this case – only the mother or the father in this case could have been the one that caused these injuries." The trial court refused to mitigate the sentence based on the Defendant's age and lack of experience and any depression she was suffering from. The court then considered the sentencing guidelines outlined in Tennessee Code Annotated section 40-35-102 and -103 and determined the maximum sentence was appropriate. The Defendant was sentenced to twenty-five years on each count, with the sentences to be served concurrently.

II. Analysis

On appeal, the Defendant raises the following issues: (1) there is insufficient evidence to sustain any conviction for aggravated child abuse; (2) there is insufficient evidence to sustain her three distinct aggravated child abuse convictions; (3) the trial court erred in not dismissing the indictments; (4) the trial court erred in allowing all the aggravated child abuse charges to be tried together; (5) the trial court erred in allowing the State to use the Defendant's statements in its case-in-chief; (6) the trial court erred in refusing to instruct the jury on the charge of aggravated assault by failure to protect; (7) the trial court erred in not granting a mistrial after the jury improperly focused on extraneous issues; and (8) the trial court erred in sentencing the Defendant.

A. Sufficiency of the Evidence

When an accused challenges the sufficiency of the evidence, this Court's standard of review is whether, after considering the evidence in the light most favorable to the State, "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979); see Tenn. R. App. P. 13(e); State v. Goodwin, 143 S.W.3d 771, 775 (Tenn. 2004) (citing State v. Reid, 91 S.W.3d 247, 276 (Tenn. 2002)). This rule applies to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. State v. Pendergrass,13 S.W.3d 389, 392-93 (Tenn. Crim. App. 1999).

In determining the sufficiency of the evidence, this Court should not re-weigh or re-evaluate the evidence. State v. Matthews, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Nor may this Court substitute its inferences for those drawn by the trier of fact from the evidence. State v. Buggs, 995 S.W.2d 102, 105 (Tenn. 1999); Liakas v. State, 286 S.W.2d 856, 859 (Tenn. 1956). "Questions concerning the credibility of witnesses, the weight and value to be given the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact." State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997); Liakas, 286 S.W.2d at 859. "A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State." State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978); State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973). The Tennessee Supreme Court stated the rationale for this rule:

> This well-settled rule rests on a sound foundation. The trial judge and the jury see the witnesses face to face, hear their testimony and observe their demeanor on the stand. Thus the trial judge and jury are the primary instrumentality of justice to determine the weight and credibility to be given to the testimony of witnesses. In the trial forum alone is there human atmosphere and the totality of the evidence cannot be reproduced with a written record in this Court.

Bolin v. State, 405 S.W.2d 768, 771 (Tenn. 1966) (citing Carroll v. State, 370 S.W.2d 523 (Tenn. 1963)). This Court must afford the State of Tennessee the strongest legitimate view of the evidence contained in the record, as well as all reasonable inferences which may be drawn from the evidence. Goodwin, 143 S.W.3d at 775 (citing State v. Smith, 24 S.W.3d 274, 279 (Tenn. 2000)). Because a verdict of guilt against a defendant removes the presumption of innocence and raises a presumption of guilt, the convicted criminal defendant bears the burden of showing that the evidence was legally insufficient to sustain a guilty verdict. State v. Carruthers, 35 S.W.3d 516, 557-58 (Tenn. 2000).

The Defendant in this case was convicted of three counts of aggravated child abuse. The statutory requirements for a conviction of aggravated child abuse as a Class A felony are as follows: (1) a person knowingly and by other than accidental means treats a child in such a way which results in serious bodily injury to the child; and (2) the child is less than six years of age. See T.C.A. § 39-15-402 (2003); Tenn. Prac. Pattern Jury Instr. T.P.I. - Crim 21.01 .

The evidence clearly proves that the victim was less than six years old. Further, we conclude that there was sufficient evidence that the victim suffered "serious bodily injury" in that the right femur, the left tibia and fibula, and the left humerus and radius were all broken, and the victim went without medical care for up to two weeks with these injuries.

The closer question is whether there was sufficient evidence upon which to determine the Defendant caused these injuries, rather than someone else. There was no direct evidence linking the Defendant to these injuries in that no one testified that they saw the Defendant cause the injuries to the victim. The case against the Defendant was made up of primarily circumstantial evidence, however, "[a] criminal offense may be established exclusively by circumstantial evidence." State v. Raines, 882 S.W.2d 376, 380 (Tenn. Crim. App. 1994) (citing State v. Hailey, 658 S.W.2d 547, 552 (Tenn. Crim. App. 1983)). "However, before an accused can be convicted of a criminal offense based on circumstantial evidence alone, the facts and circumstances 'must be so strong and cogent as to exclude every other reasonable hypothesis save the guilt of the defendant . . . .'" Id. (citing State v. Crawford, 470 S.W.2d 610, 612 (Tenn. 1971). "In other words, '[a] web of guilt must be woven around the defendant from which [she] cannot escape and from which facts and circumstances the jury could draw no other reasonable inference save the guilt of the defendant beyond a reasonable doubt.'" Id. (citing Crawford, 470 S.W.2d at 613).

The evidence presented against the Defendant included her statements that she blocked things out of her mind and that she was sorry for the pain she caused the victim. The Defendant additionally admitted becoming upset at times with the victim's excessive crying. She stated in her statement to the police that she would "handle it" if she was there alone. Jason Brunelle, the Defendant's ex-husband at the time of trial and the victim's father, stated that he did not cause the injuries, and he denied rolling over onto the victim, one of the Defendant's explanations of the injuries. He also claimed to have never been alone with the victim while in Tennessee. One of the explanations, that the victim may have been injured while the Defendant played with her, moving her legs in a bicycle type motion, was explicitly refuted by a State expert. Finally, there was evidence that the Defendant lost her temper while she was testifying.

The Defendant, in her testimony, attempted to explain the discrepancies, stating that she knew Jason Brunelle had caused the injuries to the victim, but she was afraid of telling the authorities because she was abused by him. Specifically, she stated that he previously held a knife to her throat, threw her down the stairs, bloodied her nose, and raped her. The Defendant stated that Jason Brunelle wanted the child to be a boy, and when he found out it was a girl, he was upset and beat the Defendant as a result. In giving the statements to the police, the Defendant testified that Jason Brunelle told her not to say anything or she would regret it.

We conclude that, viewed in the light most favorable to the state, there is sufficient evidence to convict the Defendant of aggravated child abuse. The only other reasonable hypothesis that would lead to the victim being injured is that, as the Defendant testified, Jason Brunelle committed the acts. However, the jury heard testimony from Jason Brunelle that he did not commit the acts. It is within the jury's purview to make credibility determinations, and in crediting the testimony of Jason

Brunelle and discrediting the testimony of the Defendant, a rational jury could have determined that a web of guilt was woven around the Defendant from which she could not escape. Id. Thus, we conclude the Defendant is not entitled to relief on this issue.

B. Double Jeopardy

In addition to challenging the sufficiency of the evidence generally, the Defendant argues there was insufficient evidence upon which to convict the Defendant of three distinct offenses of aggravated child abuse. She also terms this issue as one of double jeopardy, and that is how we view this issue. Because it is a question of law, this Court's review of a double jeopardy issue is de novo with no presumption of correctness. State v. Lewis, 958 S.W.2d 736, 738 (Tenn. 1997). The Double Jeopardy Clause in the United States Constitution provides that no person "shall . . . be subject for the same offense to be twice put in jeopardy of life or limb . . . ." U.S. Const. amend V. Similarly, the Tennessee Constitution states that "no person shall, for the same offense, be twice put in jeopardy of life or limb." Tenn. Const. art. I, § 10. Three fundamental principles underlie double jeopardy: (1) protection against a second prosecution after an acquittal; (2) protection against a second prosecution after conviction; and (3) protection against multiple punishments for the same offense. State v. Burris, 40 S.W.3d 520, 524 (Tenn. Crim. App. 2000).

The case under submission falls into the third category, multiple punishments for the same offense. When multiple sentences are imposed in a single trial, double jeopardy protection "is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense." Brown v. Ohio, 432 U.S. 161,165 (1977). Prosecutors cannot avoid the limitations of the double jeopardy clause by the simple expedient of dividing a single crime into a series of temporal or spatial units. State v. Easterly, 77 S.W.3d 226, 232 (Tenn. Crim. App. 2001). "Multiplicity concerns the division of conduct into discrete offenses, creating several offenses out of a single offense." State v. Charles L. Williams, No. M2005-00836-CCA-R3-CD, 2006 WL 3431920, at * 29 (Tenn. Crim. App., at Nashville, Nov. 29, 2006) (quoting State v. Phillips, 924 S.W.2d 662, 665 (Tenn. 1996)). Whether the acts of a defendant constitute separate offenses or one single crime must be determined by the facts and circumstances of each case. State v. Pickett, 211 S.W.3d 696, 706 (Tenn. 2007).

To determine whether several offenses have been created out of a single offense for double jeopardy purposes, several general principles must be considered: (1) a single offense may not be divided into separate parts and, generally, a single wrongful act may not furnish the basis for more than one criminal prosecution; (2) if each offense charged requires proof of a fact not required in proving the other, the offenses are not multiplicitous; and (3) where time and location separate and distinguish the commission of the offenses, the offenses cannot be said to have arisen out of a single wrongful act. State v. Epps, 989 S.W.2d 742, 745 (Tenn. Crim. App. 1998). Additional factors such as the nature of the act, the time elapsed between the alleged conduct, the intent of the accused and whether new intent was formed, and cumulative punishment may be considered for guidance in determining whether the multiple convictions violate double jeopardy. Pickett, 211 S.W.3d at 706.

We conclude the facts of this case do not support the Defendant's contention. Dr. Thomas testified in depth as to the times of the injuries. He was able to specify that the injuries in count two, the broken right femur, occurred one to two weeks prior to when the x-ray was taken on January 28, 2003. Count three, concerning the fracture to the victim's left tibia, also occurred one to two weeks prior to January 28, 2003, but Dr. Thomas affirmatively stated that the left tibia and the right femur were not broken at the same time despite being given the same range. Dr. Thomas stated that the two breaks were at different stages of healing, days apart. Finally, count four addressed the two fractures of the victim's left arm. Dr. Thomas stated that those breaks occurred seven to ten days prior to January 28, 2003. Dr. Thomas also specifically stated that the breaks to the victim's arm were the most recent of all the breaks. A rational jury could reasonably infer from Dr. Thomas's testimony that the fractures that form the basis for each count of the indictment occurred at a time when no other fractures occurred. Thus, the abuse was not a single wrongful act, and the multiple convictions do not violate the Double Jeopardy Clause. The Defendant is not entitled to relief on this issue.

C. Indictments

The Defendant next contends that the trial court erred in not dismissing the indictments due to their inadequacy. She alleges that because the indictments did not allege a specific time when the crimes occurred, her constitutional rights were violated.

Pursuant to the provisions of both the Tennessee and United States Constitutions criminal defendants have a right to know "the nature and cause of the accusation." U.S. Const. amend. VI; Tenn. Const. art. I, § 9. "As Tennessee courts have held, in order to satisfy the constitutional requirement, an indictment or presentment must provide a defendant with notice of the offense charged, provide the court with an adequate ground upon which a proper judgment may be entered, and provide the defendant with protection against double jeopardy." State v. Byrd, 820 S.W.2d 739, 741 (Tenn. 1991). A "valid indictment is an essential jurisdictional element, without which there can be no prosecution." Dykes v. Compton, 978 S.W.2d 528, 529 (Tenn. 1998); State v. Hill, 954 S.W.2d 725, 727 (Tenn. 1997). Tennessee Code Annotated section 40-13-202 states:

> The indictment must state the facts constituting the offense in ordinary and concise language, without prolixity or repetition, in such a manner as to enable a person of common understanding to know what is intended, and with that degree of certainty which will enable the court, on conviction, to pronounce the proper judgment . . . .

Additionally, "[t]he rule of law is well-established in Tennessee that the exact date, or even the year, of an offense need not be stated in an indictment or presentment unless the date or time 'is a material ingredient in the offense.'" Byrd, 820 S.W.2d at 741 (citing T.C.A. § 40-13-207).

The indictments in this case all followed the same general pattern:

Count 2

> The Grand Jurors for the CRIMINAL COURT for GREENE COUNTY, TENNESSEE, meeting on **May 2, 2005**, in GREENEVILLE, after being duly empaneled and sworn, upon their oath present that **Misty Brunelle**, on or about the _____ day of January, 2003, and after the injury inflicted in Count 1, in the State and County aforesaid, and before the finding of this indictment, did unlawfully commit the offense of **Aggravated Child Abuse**, by knowingly, other than by accidental means, treating **[the victim]**, a child less than six (6) years of age, in such a manner as to inflict serious bodily injury by breaking the child's right femur; **a Class A felony**, in violation of **T.C.A. § 39-15-402(a), (b)**, and against the peace and dignity of the State of Tennessee.

The Defendant subsequently filed a motion for a bill of particulars, requesting the specific times, specific places, specific injuries, and specific behavior associated with the Defendant for each of the four counts. The State responded in a bill of particulars with the date ranges as introduced at trial, and it stated that all the acts occurred in or around the Defendant's residence. In its argument, the State asserts that the bill of particulars did not need to further state the specific injuries because the specific broken bones were listed in the indictments, and the circumstances of the situation prevented the State from further alleging specific conduct on the part of the Defendant as there were no witnesses to the events.

We first note that a bill of particulars will not cure a defective indictment. State v. Mencer, 798 S.W.2d 543, 546 (Tenn. Crim. App. 1990). However, we conclude the indictments were not defective as they sufficiently apprised the Defendant of what she was being charged with so that there were adequate grounds upon which to pronounce judgment. Each count alleged the essential elements of the crime charged in it and that each occurred after the crime charged in the previous count. The exception is Count 3, which stated, "after the injury inflicted in Count 1 and at about the same time as the injury inflicted in Count 2 . . . ." However, this does not render the indictment in Count 3 insufficient as we can find no reason this would prevent the Defendant from asserting a future double jeopardy claim. See Byrd, 820 S.W.2d at 741 (explaining broad minimum requirements of indictment in relation to time of the offense); supra, Section II(B). The indictment in this case satisfy the minimum requirements of the law. The Defendant is not entitled to relief on this issue.

D. Motion to Sever

The Defendant next alleges that the trial court erred in not granting her motion to sever the offenses so that they may be tried separately. We review a decision not to sever offenses with an abuse of discretion standard. State v. Shirley, 6 S.W.3d 243, 247 (Tenn. 1999). "A trial court's refusal to sever offenses will be reversed only when the 'court applied an incorrect legal standard, or reached a decision which is against logic or reasoning that caused an injustice to the party complaining.'" Id. (quoting State v. Shuck, 953 S.W.2d 662, 669 (Tenn. 1997)).

Although the trial court determined not to sever the offenses, its reasons for doing so were

not specifically placed on the record, except for stating, "If there was any possibility that I thought that the case would not stand if a conviction were had for lack of severance . . . , I would not try the case; but I believe that it meets all those standards and that it can be tried with the conditions that I've stated and without being severed." It appears from additional statements that the trial court made this determination based on the fact that these offenses were part of a common scheme or plan.

Tennessee Rule of Criminal Procedure 8 allows permissive joinder of offenses if: "(1) the offenses constitute parts of a common scheme or plan; or (2) they are of the same or similar character." Tenn. R. Crim. P. 8(b). Tennessee Rule of Criminal Procedure 14 allows a Defendant to make a motion to sever offenses when offenses were joined under Rule 8(b), stating "the defendant has the right to a severance of the offenses unless the offenses are part of a common scheme or plan and the evidence of one would be admissible in the trial of the others." Tenn. R. Crim. P. 14(b)(1).

The Defendant has not shown an abuse of discretion on the part of the trial court in determining that this was not part of a common scheme or plan as the injuries were all similar in that they were broken bones. Further, Shirley states that the "'primary inquiry into whether a severance should have been granted under Rule 14 is whether the evidence of one crime would be admissible in the trial of the other if the two counts of indictment had been severed.'" Shirley, 6 S.W.3d at 247 (quoting State v. Burchfield, 664 S.W.2d 284, 286 (Tenn.1984)). "To ensure that a defendant receives a fair trial, Tennessee Rule of Evidence 404(b) excludes evidence of 'other crimes, wrongs, or acts' committed by the defendant when offered only to show the defendant's propensity to commit those 'crimes, wrongs, or acts.'" Id. "However, when offenses alleged to be parts of a common scheme or plan are otherwise relevant to a material issue at trial, then Rule 404 will not bar their admissibility into evidence." Id. We conclude that the existence of the multiple episodes of child abuse are "otherwise relevant" to the issue of whether these injuries were the result of an accident. See T.C.A. § 39-15-402 (2003). Because the Defendant has not established that the trial court abused its discretion in determining the offenses were part of a common scheme or plan and the evidence would otherwise be admissible, the Defendant is not entitled to relief on this issue.

E. Admissibility of the Defendant's Statements

The Defendant next alleges error on the part of the trial court in allowing the Defendant's statements to be used at trial. The Defendant claims that the two written statements were not relevant to any issue in the case.

First, we note that the admissibility, relevancy, and competency of evidence are matters entrusted to the sound discretion of the trial court. With that principle in mind, we review the trial court's evidentiary rulings for abuse of discretion. See State v. DuBose, 953 S.W.2d 649, 652 (Tenn. 1997); State v. Gray, 960 S.W.2d 598, 606 (Tenn. Crim. App. 1997). The Tennessee Rules of Evidence make admissible "all relevant evidence . . . except as provided by the Constitution of the United States, the Constitution of Tennessee, these Rules, or other rules or laws of general application in the courts of Tennessee. Evidence which is not relevant is not admissible." Tenn. R.

Evid. 402. "Relevant evidence" is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Tenn. R. Evid. 401.

The Defendant's first statement, dated January 30, 2003, addressed the date that the Defendant, Jason Brunelle, and the victim moved from Vermont to Tennessee. It also included a statement concerning Jason Brunelle's employment, and the fact that the victim was "thriving and fine" when the group left Vermont. Further, the statement addressed the victim's crying, and who would take care of her. The Defendant's statement also provided a possible explanation for the victim's injuries, "maybe the seatbelt across the baby seat could be too tight." Finally, the Defendant also stated, "But most of the time, when I get impatient with [the victim] crying, I will holler at Jason. When Jason's not at home, I just handle it."

These statements are relevant to whether the abuse occurred in Tennessee, whether Jason Brunelle was at home during the two weeks in question, the extent of the victim's crying, and a potential explanation for the victim's injuries. Further, "I'll handle it," could be considered evidence implicating the Defendant in the crimes. This statement is relevant to multiple issues in the case.

The Defendant's second statement, dated January 31, 2003, addressed two other potential explanations for the victim's injuries. The Defendant also admitted that she got upset when the victim would not stop crying, and that she blocks things out of her head when she's done things. Additionally, the Defendant apologized to the victim, stating "I'm sorry for the pain I've caused her . . . ."

These statements are relevant circumstantial evidence in that the Defendant had knowledge of the victim's well-being because she was the victim's primary caretaker. The Defendant blocked things out of her head, but she was sorry for the pain she caused the victim.

The Defendant alternatively argues that these statements should not be admitted under Tennessee Rule of Evidence 403, which states "although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading of the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." The Defendant alleges that these statements confuse the issues because the jury may be misled into believing the statements are meant to explain the injuries, or that the Defendant spent time with the victim, which is cumulative.

We conclude the Defendant has not shown an abuse of discretion on the part of the trial court in determining that the danger of confusion of the issues or the misleading of the jury is substantially outweighed by the probative value of the evidence. The evidence has extensive probative value in addressing the points mentioned above. The Defendant is not entitled to relief on this issue.

F. Jury Instructions

The Defendant next contends the trial court erred in failing to instruct the jury on the charge of aggravated assault by failure to protect. See T.C.A. § 39-13-102(b) (2003). A trial court has the duty, in criminal cases, to fully instruct the jury on the general principles of law relevant to the issues raised by the evidence. See State v. Burns, 6 S.W.3d 453, 464 (Tenn. 1999); State v. Harbison, 704 S.W.2d 314, 319 (Tenn. 1986); State v. Elder, 982 S.W.2d 871, 876 (Tenn. Crim. App. 1998). Nothing short of a "clear and distinct exposition of the law" satisfies a defendant's constitutional right to trial by jury. State v. Phipps, 883 S.W.2d 138, 150 (Tenn. Crim. App. 1994). In other words, the court must instruct the jury on those principles closely and openly connected with the facts before the court, which are necessary for the jury's understanding of the case. Elder, 982 S.W.2d at 876. Because questions of the propriety of jury instructions are mixed questions of law and fact, our standard of review here is de novo, with no presumption of correctness. State v. Rush, 50 S.W.3d 424, 427 (Tenn. 2001); State v. Smiley, 38 S.W.3d 521, 524 (Tenn. 2001).

Generally, "a defendant has a constitutional right to a correct and complete charge of the law." State v. Teel, 793 S.W.2d 236, 249 (Tenn. 1990), *superceded by statute on other grounds as stated in* State v. Reid, 91 S.W.3d 247 (Tenn. 2002). When reviewing jury instructions on appeal to determine whether they are erroneous, this Court should "review the charge in its entirety and read it as a whole." State v. Hodges, 944 S.W.2d 346, 352 (Tenn. 1997). The Tennessee Supreme Court, relying on the words of the United States Supreme Court, has noted that:

> [J]urors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might. Differences among them in interpretation of instructions may be thrashed out in the deliberative process, with commonsense understanding of the instructions in the light of all that has taken place at the trial likely to prevail over technical hairsplitting.

Id. (quoting Boyde v. California, 494 U.S. 370, 380-81 (1990)). A jury instruction is considered "prejudicially erroneous," Hodges, 944 S.W.2d at 352, only "if it fails to fairly submit the legal issues or if it misleads the jury as to the applicable law." Id. Even if a trial court errs when instructing the jury, such instructional error may be found harmless. State v. Williams, 977 S.W.2d 101, 104 (Tenn. 1998).

Tennessee Code Annotated section 39-13-102(b) describes the offense of aggravated assault by failure to protect as follows: "A person commits aggravated assault who, being the parent or custodian of a child or the custodian of an adult, intentionally or knowingly fails or refuses to protect such child or adult from an aggravated assault . . . or aggravated child abuse . . . ." Thus, the elements of aggravated assault by failure to protect are as follows:

> (1) That the defendant was the parent of a child;
> (2) That another person intentionally or knowingly caused bodily injury to the child;
> (3) That such person caused serious bodily injury to the child;
> (4) That the defendant intentionally or knowingly failed or refused to protect said child from the person's actions.

See Tenn. Prac. Pattern Jury Instr. T.P.I. - Crim 6.02. Under State v. Burns, 6 S.W.3d 453, 466-67 (Tenn. 1999), an offense is a lesser included offense if:

> (a) all of its statutory elements are included within the statutory elements of the offense charged; or
> (b) it fails to meet the definition in part (a) only in the respect that it contains a statutory element or elements establishing
> (1) a different mental state indicating a lesser kind of culpability; and/or
> (2) a less serious harm or risk of harm to the same person, property or public interest; or
> (c) it consists of
> (1) facilitation of the offense charged or of an offense that otherwise meets the definition of lesser-included offense in part (a) or (b); or
> (2) an attempt to commit the offense charged or an offense that otherwise meets the definition of lesser-included offense in part (a) or (b); or
> (3) solicitation to commit the offense charged or an offense that otherwise meets the definition of lesser-included offense in part (a) or (b).

Aggravated assault by failure to protect is not a lesser-included offense of aggravated child abuse because it fails to meet the Burns requirements. Because aggravated assault by failure to protect is not a lesser included offense or a defense, it was not error to refuse to instruct the jury on that offense. See T.C.A. § 40-18-110 (2003) ("When requested by a party in writing prior to the trial judge's instructions to the jury in a criminal case, the trial judge shall instruct the jury as to the law of each offense specifically identified in the request that is a lesser included offense of the offense charged in the indictment or presentment."); Tenn. Prac. Pattern Jury Instrs. T.P.I. - Crim 40.01 to 40.18. The Defendant is not entitled to relief on this issue.

G. Mistrial

The Defendant also challenges the trial court's refusal to grant a mistrial after the jury submitted questions concerning the Defendant's children. The questions submitted to the trial court were as follows:

> What happens as a verdict if the if the jury cannot agree? What happens to the defendant if we do not agree as to the disposition of her children?

and

> Would a hung jury on one count, cancel the other decisions made on the other three counts? Can we add anger management or rehabilitation classes to a sentence?

The trial court responded to the questions by telling the jurors he could not answer those questions. The Defendant then made a motion for a mistrial, which the trial court denied stating, "[J]ury verdicts are not affected unless there is extraneous information that comes from outside, not from within the jury itself in the deliberations and concerns."

The decision on whether to grant a mistrial lies within the sound discretion of the trial court. State v. Smith, 871 S.W.2d 667, 672 (Tenn. 1994). We will not interfere with the trial court's decision to refuse to grant a mistrial "absent clear abuse appearing on the face of the record." State v. Burns, 979 S.W.2d 276, 293 (Tenn. 1998), *cert. denied*, 527 U.S. 1039 (1999).

In determining whether to grant a mistrial, the trial court would determine "[i]f it appears that some matter has occurred which would prevent an impartial verdict from being reached . . . ." Arnold v. State, 563 S.W.2d 792, 794 (Tenn. Crim. App. 1977). Additionally, this Court has stated that a mistrial should be declared if there will be a miscarriage of justice if it were not. See Burns 979 S.W.2d at 293; State v. Allen, 976 S.W.2d 661, 668 (Tenn. Crim. App. 1997).

We conclude the Defendant has not shown a clear abuse on the part of the trial court. Tennessee Code Annotated section 40-35-201(b), in fact, prevents the trial court from addressing the questions posed by the jury. While the Defendant argues that something must have inappropriately entered into the jury room, otherwise the jury would not ask such questions, we cannot agree. The Defendant is not entitled to relief on this issue.

H. Sentencing

Finally, the Defendant challenges her effective twenty-five year sentence as excessive because the trial court improperly weighed the enhancement and mitigating factors. When a defendant challenges the length, range or manner of service of a sentence, it is the duty of this Court to conduct a de novo review on the record with a presumption that "the determinations made by the court from which the appeal is taken are correct." T.C.A. § 40-35-401(d) (2006). As the Sentencing Commission Comments to this section note, the burden is now on the appealing party to show that the sentencing is improper. T.C.A. § 40-35-401, Sentencing Comm'n Cmts. This means that if the trial court followed the statutory sentencing procedure, made findings of facts which are adequately supported in the record and gave due consideration and proper weight to the factors and principles that are relevant to sentencing under the 1989 Sentencing Act, T.C.A. § 40-35-103 (2006), we may not disturb the sentence even if a different result was preferred. State v. Ross, 49 S.W.3d 833, 847 (Tenn. 2001). The presumption does not apply to the legal conclusions reached by the trial court in sentencing a defendant or to the determinations made by the trial court which are predicated upon uncontroverted facts. State v. Dean, 76 S.W.3d 352, 377 (Tenn. Crim. App. 2001); State v. Butler, 900 S.W.2d 305, 311 (Tenn. Crim. App. 1994); State v. Smith, 891 S.W.2d 922, 929 (Tenn. Crim. App. 1994).

In conducting a de novo review of a sentence, we must consider: (1) any evidence received at the trial and sentencing hearing, (2) the presentence report, (3) the principles of sentencing, (4)

the arguments of counsel relative to sentencing alternatives, (5) the nature and characteristics of the offense, (6) any mitigating or enhancement factors, (7) any statements made by the defendant on his or her own behalf and (8) the defendant's potential or lack of potential for rehabilitation or treatment. See T.C.A. § 40-35-210 (2003); State v. Taylor, 63 S.W.3d 400, 411 (Tenn. Crim. App. 2001).

The sentence to be imposed by the trial court for a Class A felony is presumptively the midpoint in the range. T.C.A. § 40-35-210(c) (2003) (repealed 2005). Procedurally, the trial court is to increase the sentence within the range based upon the existence of enhancement factors and then reduce the sentence as appropriate for any mitigating factors. T.C.A. § 40-35-210(d), (e). The weight to be afforded an existing factor is left to the trial court's discretion so long as it complies with the purposes and principles of the 1989 Sentencing Act, and its findings are adequately supported by the record. T.C.A. § 40-35-210, Sentencing Comm'n Cmts.; see State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991).

Upon review, we conclude the trial court followed the sentencing procedures in determining the Defendant's sentence. The trial court found that the victim was treated with exceptional cruelty when she was denied care for three weeks, and the Defendant was in a position of private trust. See T.C.A. § 40-35-114(6), (16) (2003). We conclude the enhancement based on the victim being treated with exceptions cruelty was proper because there was evidence that the Defendant denied the victim treatment for up to three weeks after the first broken bones. See State v. Arnett, 49 S.W.3d 250, 258 (Tenn. 2001) (stating proper application of this factor requires a finding of cruelty "over and above" what is required for the offense itself); State v. Williams, 920 S.W.2d 247, 258-59 (Tenn. Crim. App. 1995) (stating application of this factor is usually found in cases of abuse or torture). Additionally, the Defendant was in a position of private trust because she was the mother and caretaker of the infant victim. See State v. Turner, 30 S.W.3d 355, 362 (Tenn. Crim. App. 2000).

The Defendant also alleges the trial court improperly refused to apply the mitigating factors that the Defendant was young and inexperienced and she was depressed. See T.C.A. § 40-35-113(6), (8) (2003). Although the Defendant may have been young and inexperienced as a mother and depressed, it is well within the trial court's purview to refuse to mitigate the Defendant's sentence based on those factors. We will not disturb the trial court's judgement on this issue. The Defendant is not entitled to relief.

III. Conclusion

In accordance with the foregoing reasoning and authorities, we affirm the judgments of the trial court.

ROBERT W. WEDEMEYER, JUDGE